AGREED VALUATION AS AFFECTING THE LIABILITY OF COMMON CARRIERS FOR NEGLIGENCE.

THE rule that a common carrier may not relieve itself by contract from liability for loss or damage to goods due to its negligence is now generally accepted, yet even with courts professing to follow it there is an increasing disposition to limit recovery against the carrier to the amount agreed upon between the carrier and the shipper as the value of the shipment, though loss occurs through the carrier's negligence. We purpose to examine briefly the decisions sustaining such limitations and to consider their significance in relation to the general rule, assuming that this rule is accepted as settled law.

It is obvious that a court which rejects this general rule, and allows a common carrier to relieve itself by contract from liability for negligence, will in like manner sustain a partial exemption from such liability. The partial exemption may be in form the limitation of liability to a specific sum or the valuation of the goods at some definite figure.[1] In either case the limit of recovery even for negligence is fixed. These decisions do not, however, explain how a court refusing to allow the limitation of liability for negligence can consistently in such case uphold an agreed valuation. They require no comment save that, in accordance with a well-established principle, any doubt as to whether a stipulation under consideration does or does not include loss by reason of negligence must be resolved in favor of the latter view and against the carrier.[2]

Where, however, carriers are not permitted to contract away their liability for negligence, the courts have decided with practical unanimity that a stipulation, without reference to attempted valuation, that liability in case of loss shall be limited to a sum specified

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[1] Manchester, etc., Ry. Co. *v.* Brown, 8 App. Cas. 703; Great Western Ry. Co. *v.* McCarthy, 12 App. Cas. 218; M'Cance *v.* London & Northwestern Ry. Co., 7 H. & N. 477 (Exchequer), 3 H. & C. 343 (Exchequer Chamber); Belger *v.* Dinsmore, 51 N. Y. 166; Magnin *v.* Dinsmore, 62 N. Y. 35, 70 N. Y. 410; Zimmer *v.* New York Central, etc., R. R. Co., 137 N. Y. 460.

[2] Westcott *v.* Fargo, 63 Barb. (N. Y.) 349, 61 N. Y. 542; Vrooman *v.* American, etc., Express Co., 2 Hun (N. Y.) 512; Marquis *v.* Wood, 61 N. Y. Supp. 251.

is, in case of loss through negligence, invalid.[3] There is manifest reason for this holding, since it is difficult to understand how a carrier, if it may not relieve itself from liability for negligence up to the total value of the goods carried, may nevertheless in effect stipulate for non-liability as to one-half or nine-tenths or ninety-nine hundredths of their value.[4]

An agreement of this nature, not even purporting to be based upon the value of the goods carried, discloses an obvious effort of the carrier to escape liability beyond the fixed sum, and contains none of the extenuating elements which in cases of so-called agreed valuation have induced the courts to sustain such valuation as a limit of liability. In fact, Mr. Hutchinson explains the divergence of the decisions upon the question of the exempting of the carrier from liability beyond a fixed amount as depending on whether the contract in question limits liability to a certain sum or constitutes a *bona fide* valuation of the goods.[5] This explanation cannot, however, be accepted as adequate, for while stipulations in form limiting liability to a certain amount are everywhere invalid,[6] the decisions are not harmonious where the agreement in form fixes the value of the goods.[7] These decisions are not free from difficulty and form the material for this discussion.

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[3] Eells *v.* St. Louis, etc., Ry. Co., 52 Fed. 903; Schwarzchild *v.* Nat'l S. S. Co., 74 Fed. 257; Mobile, etc., R. R. Co. *v.* Hopkins, 41 Ala. 486; Georgia Pacific Ry. Co. *v.* Hughart, 90 Ala. 36; Galt *v.* Adams Express Co., MacArthur & M. (D. C.) 124; Georgia R. R. & Banking Co. *v.* Keener, 93 Ga. 808; Central of Georgia Ry. Co. *v.* Murphey & Hunt, 113 Ga. 514; Central of Georgia Ry. Co. *v.* Hall, 124 Ga. 322; Chicago & Northwestern Ry. Co. *v.* Chapman, 133 Ill. 46; K. C., etc., R. R. Co. *v.* Simpson, 30 Kan. 645; Adams Express Co. *v.* Hoeing, 8 Ky. L. Rep. 154, 9 Ky. L. Rep. 814; Moulton *v.* St. Paul, etc., Ry. Co., 31 Minn. 85; Southern Express Co. *v.* Moon, 39 Miss. 822; Chicago, etc., R. R. Co. *v.* Abels, 60 Miss. 1017; Southern Express Co. *v.* Seide, 67 Miss. 609; Doan *v.* St. Louis, etc., Ry. Co., 38 Mo. App. 408; U. S. Express Co. *v.* Backman, 28 Oh. St. 144; Pittsburg, etc., Ry. Co. *v.* Sheppard, 56 Oh. St. 68; Ambach *v.* B. & O. R. R. Co., 4 Oh. Dec. 467; Coward *v.* East Tennessee, etc., R. R. Co., 16 Lea (Tenn.) 225; Ry. Co. *v.* Wynn, 88 Tenn. 320; Southern Pacific Ry. Co. *v.* Maddox, 75 Tex. 300; St. Louis, etc., Ry. Co. *v.* Robbins, 14 S. W. 1075 (Tex.); Galveston, etc., Ry. Co. *v.* Ball, 80 Tex. 602; Virginia, etc., R. R. Co. *v.* Sayers, 26 Grat. (Va.) 328; Maslin *v.* B. & O. R. R. Co., 14 W. Va. 180; Abrams *v.* Milwaukee, etc., R. Co., 87 Wis. 485.

As to the Massachusetts decisions see comment in note 10.

[4] See, for example, Baughman *v.* Louisville, etc., R. R. Co, 94 Ky. 150; Ry. Co. *v.* Wynn, 88 Tenn. 320.

[5] Hutchinson, Carriers, 2 ed., Mechem, § 249 *et seq.*

[6] Except, of course, in New York and perhaps in Massachusetts. See *infra*, note 10.

[7] Thus even in cases of agreed valuation the following jurisdictions deny the validity of such stipulations in cases of negligence: Overland Mail & Express Co. *v.* Carroll, 7 Colo 43; Adams Express Co. *v.* Stettaners, 61 Ill. 184; Southern Express

The leading decision in this group of cases is Hart *v.* Pennsylvania Railroad Co.[8] Hart sued the Pennsylvania Railroad to recover damages for the breach of a contract to transport certain horses from Jersey City to St. Louis. Through the carrier's negligence[9] one of the horses was killed and four were injured. Hart claimed to recover damages to the amount of $19,800, offering to prove that the horses were worth, the one killed, $15,000, and the others from $3000 to $3500 apiece, and that his loss was as stated. This evidence was excluded on the ground that the contract of shipment provided that the carrier assumed "liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding two hundred dollars each." On appeal to the Supreme Court of the United States it was decided that notwithstanding the carrier's negligence Hart's recovery should be limited to the agreed valuation.

Prior to this decision there was much indefiniteness of principle in the reported cases, and a decided lack of agreement. It has subsequently, however, been followed in many jurisdictions,[10] the

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Co. *v.* Marks, etc., Co., 40 So. 65 (Miss.); Orndorff & Co. *v.* Adams Express Co., 3 Bush (Ky.) 194; Baughman *v.* Louisville, etc., R. R. Co., 94 Ky. 150; Cincinnati, etc., Ry. Co.'s Receiver *v.* Graves, 21 Ky. L. Rep. 684; Ill. Cent. Ry. Co. *v.* Radford, 23 Ky. L. Rep. 886; Hughes *v.* Pennsylvania R. R. Co., 202 Pa. St. 222. Elkins *v.* Empire Transportation Co., 81* Pa. St. 315, did not involve negligence. The statement to the contrary is evidently an error of the reporter: Weiller *v.* Penna. R. R. Co., 134 Pa. St. 310. The decision by Judge Hare in Newburger *v.* Howard, 6 Phila. (Pa.) 174, cited by the court in the Hart case, and in accord therewith, was rendered before the Supreme Court of Pennsylvania had decided otherwise. It is noteworthy that Chief Justice Mitchell has consistently dissented from the Pennsylvania decisions, and in the latest case, Hughes *v.* Railroad, he is joined by Mr. Justice Brown. Galveston, etc., Ry. Co. *v.* Ball, 80 Tex. 602; Houston, etc., Ry. Co. *v.* Williams, 31 S. W. 556 (Tex.).

In states where statutes or the state constitution forbid common carriers to vary their common law liability, stipulations as to agreed valuation have been held to be within the prohibition of the statute. Lucas *v.* Burlington, etc., Ry. Co., 112 Ia. 594; St. Louis, etc., Ry. Co. *v.* Sherlock, 59 Kan. 23; Ohio, etc., Ry. Co. *v.* Taber, 98 Ky. 503; Ill. Cent. R. Co. *v.* Radford, 23 Ky. L. Rep. 886; Pacific Express Co. *v.* Hertzberg, 42 S. W. 795 (Tex.); St. Louis, etc., Ry. Co. *v.* McIntyre, 82 S. W. 346 (Tex.).

[8] 112 U. S. 331. There is a very satisfactory collection of the cases citing this decision in 10 Rose, Notes to the U. S. Reports, 896.

[9] In the report of the case in the lower court, 7 Fed. 630, it is said that the loss was due to the *gross* negligence of the carrier.

[10] St. Louis, etc., Ry. Co. *v.* Weakly, 50 Ark. 397; Peirce *v.* Southern Pac. Co., 47 Pac. 874 (Cal.); Coupland *v.* Housatonic R. R. Co., 61 Conn. 531; Georgia Southern Ry. Co. *v.* Johnson, 121 Ga. 231; Louisville, etc., Ry. Co. *v.* Nicholai, 4 Ind. App. 119; Adams Express Co. *v.* Carnahan, 63 N. E. 245 (Ind.); Smith *v.* American Express Co., 108 Mich. 572, *semble;* Alair *v.* Northern Pac. R. R. Co., 53 Minn. 160; Harvey *v.* Terre Haute, etc., R. R. Co., 74 Mo. 538; Brown *v.* Wabash, etc., Ry. Co., 18 Mo. App.

courts in some instances practically repudiating, though professing to distinguish, their earlier decisions,[11] and it now represents the prevailing view. Nevertheless in some states its soundness is questioned and a contrary rule established.[12]

It must not be forgotten that whatever may be the theory underlying this decision, its result is to relieve the carrier from obligation to pay to the shipper the full value of the goods, and that, too, though the loss has happened through the carrier's negligence. Since the general rule forbidding the limitation of liability for negligence is so well settled, it becomes of importance to inquire by what reasoning this conclusion is reached.

The Hart case, and other decisions in accord with it, suggest "estoppel" as the foundation upon which they may be rested.[13]

568; Duntley *v.* Boston & Maine, 66 N. H. 263; Durgin *v.* American Express Co., 66 N. H. 277; Ballou *v.* Earle, 17 R. I. 441; Johnstone *v.* Railroad Co., 39 S. C. 55; Richmond, etc., R. Co. *v.* Payne, 86 Va. 481; Loeser *v.* Chicago, etc., R. Co., 94 Wis. 571; Ullman *v.* C. & N. W. R. Co., 112 Wis. 150; Robertson *v.* Grand Trunk Ry. Co. of Canada, 24 Can. Supreme Ct. 611.

Curiously enough the Massachusetts cases do not make the distinction prevailing generally in the other decisions between a limitation of liability to a specific sum and an agreement of valuation at that sum, but uphold the fixed limit of liability if reasonable, basing their conclusions apparently on the test as settled in England by statute, *viz.*, whether in the mind of the court the contract limiting liability is reasonable. See Phillips *v.* Earle, 8 Pick. (Mass.) 182; Squire *v.* New York Cent. R. R. Co., 98 Mass. 239. In this case, *e. g.*, the stipulation was to the effect that the carrier should "not for any cause be held liable beyond the sum of $200 for injury to, or loss of, any single animal carried pursuant to this agreement, *although the actual value of such animal may exceed that amount.*" Graves *v.* Lake Shore, etc., R. R. Co., 137 Mass. 33; Hill *v.* Boston, etc., R. R. Co., 144 Mass. 284; Brown *v.* Cunard Steamship Co., 147 Mass. 58; Hood Co. *v.* American Pneumatic Service Co., 77 N. E. 638 (Mass.).

Among the earlier decisions, also, the distinction is frequently overlooked, but since the Hart case it has been recognized almost universally.

[11] Thus with Great Southern R. R. Co. *v.* Little, 71 Ala. 611, compare L. & N. R. R. Co. *v.* Sherrod, 84 Ala. 178; with Kallman *v.* U. S. Express Co., 3 Kan. 198, and K. C., etc., R. R. Co. *v.* Simpson, 30 Kan. 645, compare Pacific Express Co. *v.* Foley, 46 Kan. 457; with Coward *v.* East Tennessee, etc., R. R. Co., 16 Lea (Tenn.) 275, compare Ry. Co. *v.* Sowell, 90 Tenn. 17, and Starnes *v.* Railroad, 91 Tenn. 518; with Brown *v.* Adams Express Co., 15 W. Va. 812, compare Zouch *v.* Chesapeake & Ohio R. Co., 36 W. Va. 524. In this connection the Ohio decisions are specially interesting. In Ry. Co. *v.* Simon, 15 Oh. Cir. Ct. Rep. 123, the lower court distinguishes the earlier Ohio cases of U. S. Express Co. *v.* Backman, 28 Oh. St. 144, and Pittsburg, etc., Ry. Co. *v.* Sheppard, 56 Oh. St. 68, and accepts the Hart case. On appeal the decision is affirmed on another ground, to wit, that the judgment of the Circuit Court involved the weight of the evidence, Ry. Co. *v.* Simon, 63 Oh. St. 598; but the opinion of the Supreme Court in Wells, Fargo & Co. *v.* Bell, 65 Oh. St. 408, shows, we believe, that it is not unlikely that Ohio will follow the federal decision.

[12] See *supra*, note 7.

[13] Hart *v.* Pennsylvania Railroad Co., 112 U. S. 331, 341; Georgia Southern Ry.

Since the carrier incurs liability for the safety of the goods, he is entitled, as all the cases agree, to be informed of the extent of that liability; in other words, he has a right to know the value of the goods, since the care required of him is properly proportioned in some degree to such value. His liability is in the nature of that of an insurer,[14] and his compensation is in consequence made up theoretically of two elements, — one a consideration for the services of transportation, the other for the risk assumed. As with other insurers, the extent of that risk helps to determine his charge. When, therefore, the shipper, to secure a lower rate, misrepresents the value and the carrier is misled by such misrepresentation, and loss occurs *in consequence* of the lower valuation, a case is presented to which the principle of estoppel is applicable.

Some cases disclose all these facts, and are properly rested on the basis of estoppel.[15] Under modern conditions of transportation goods known to be valuable are, as a rule, accorded greater care than is bestowed upon goods of little apparent value. As a consequence, it sometimes happens that in the same catastrophe all the latter are saved, whereas the former are lost. In such case, where a valuable parcel, represented otherwise, has been lost, the loss occurs because the true value has been misrepresented by the shipper. The loss is really due to the shipper's own act, and consequently should impose no liability on the carrier. Where, however, loss would have occurred, even though the true value had been stated, the carrier has not been injured by the misrepresentation of the shipper, save that he has not received as high a rate of freight as he would have charged had the true value

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Co. *v.* Johnson, 121 Ga. 231; Graves *v.* Lake Shore, etc., R. R. Co., 137 Mass. 33; Richmond, etc., R. Co. *v.* Payne, 86 Va. 481; etc.

[14] It should always be remembered that, though the common law liability of the carrier is in certain respects the liability of an insurer, the fact that he is the bailee of the goods insured is of vital importance in determining whether or not rules with respect to the contract of insurance are to be applied in an unmodified form to this particular contract. In the cases under consideration it is essential to keep this in mind, in view of the rule requiring generally the richest good faith in the negotiations of the contract of insurance.

[15] See Sleat *v.* Fagg, 5 B. & Ald. 342, particularly Bayley's comment on Batson *v.* Donovan, 4 B. & Ald. 21; Earnest *v.* Express Company, 1 Woods (U. S.) 573; Oppenheimer *v.* U. S. Express Co., 69 Ill. 62. *Cf.* Southern Express Co. *v.* Everett, 37 Ga. 688, and Everett *v.* Southern Express Co., 46 Ga. 303. In the Hart case the court says that what the shipper did "tended to lessen the vigilance the carrier would otherwise have bestowed," but it does not appear that the loss was due to the fact that vigilance had been diminished in consequence of such valuation.

been declared. It cannot be contended logically that he has been injured by assuming a greater liability than he intended to assume,[16] for the very question is whether he has assumed such liability, and the result of imposing it on him cannot be given as a reason for its imposition or non-imposition. Furthermore, unlike a private individual, he is compellable to accept the responsibility, and his right is restricted to insisting on freight money properly proportioned to the services he renders and the risk he incurs. It is difficult, therefore, to understand how a decision can be rested on the estoppel theory where the misrepresentation in no way operates as an element in causing the loss.

Furthermore, since estoppel, properly considered, arises only where a misrepresentation has actually misled to his damage the individual to whom it is made, estoppel can play no proper part when the carrier *knows* the true value of the goods shipped and is consequently not misled by the shipper's valuation. In such case no reason exists for refusing to allow the shipper to contradict his assertion of value, unless reliance can be placed upon the contractual obligation.

Estoppel, therefore, as a theory upon which to explain these cases, has a proper place only where the carrier does not know[17] that the true value is misstated, and where the misrepresentation of value enters into the loss as at least a contributing cause.

Few cases recognize this. Even in the Hart case, the question of the carrier's knowledge is practically ignored. Counsel for the shipper asserts in argument that the carrier knew the value was greater than that named in the printed contract before it received the goods for shipment; but comment on this knowledge, or lack of knowledge, is conspicuously absent in the opinion of the Supreme Court, and likewise in the opinion of the court below.[18]

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[16] See Graves *v.* Lake Shore, etc., R. R. Co., 137 Mass. 33, where the court says: "He imposes upon the carrier the obligations of a contract different from that into which he entered." Since the carrier is compellable to accept the goods he cannot say that *non constat,* but that if he had known the true value he would not have entered into the contract. It was his duty to enter into it, and unless the misrepresentation of value has in some manner contributed to the loss, the carrier has *in this particular instance* been damaged only to the extent to which the compensation received by him has been less than he might have demanded. It is on account of the loss to him *in the aggregate* from such diminished compensation that he should be protected. See *infra.*

[17] See cases *infra,* note 19.

[18] In Black *v.* Goodrich Transportation Co., 55 Wis. 319, the court says that in the Hart case in the lower court it appeared that there was no evidence that the carrier

While, therefore, Mr. Justice Blatchford refers to estoppel as a reason for his decision, it is doubtful whether this principle can be accepted as satisfactory.

If, then, the estoppel theory is inadequate, except in the limited class of cases referred to, the decision can apparently be rested only on the basis of contract. It is important, therefore, to discover the exact limitations of the rule, since its effect is to restrict the operation of the general principle that liability for negligence may not be limited by contract even partially.

Here, again, if the carrier knows the true value of the goods shipped, it is not easy to understand on what theory can be explained the conclusiveness of the agreed valuation where loss or damage results through negligence. Certainly the mere form of the contract cannot control the result, and since the carrier and the shipper in the case supposed are both cognizant of the true value of the goods shipped, the placing of a lower valuation thereon is a patent effort to absolve the carrier from a portion of his liability. Where, then, there is negligence, a reduced rate allowed in consequence is of no more effect than a consideration given for any other agreement discountenanced by the law. The decisions are practically unanimous to the effect that where the stipulation is in form a limitation of liability to a specified amount, such limitation will not be upheld in cases of negligence, and why a different result should be reached because the parties with full knowledge of all the facts cast their agreement into the language of agreed valuation, is one for which we confess ourselves unable to give a reason.

It is freely admitted that the cases have not turned on the question of the carrier's knowledge or ignorance of the true value. Reference thereto has frequently been made,[19] but it has received

knew of the extraordinary value of the shipment, but it is impossible to discover this in the report of the lower court's decision in 7 Fed. 630. In the Supreme Court the opinion of the court leads to the inference that the carrier was misled as to value, since the court speaks of "fraud," "imposition," "misrepresenting the nature or value of the articles," but it is rather surprising to find no more definite reference to the question of actual deception. It is impossible to draw with assurance any inference with respect to this question from the statement that: "Although the horses, being race-horses, may, aside from the bill of lading, have been of greater real value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixed; and it is not asserted that the plaintiff named any value, greater or less, otherwise than as he assented to the value named in the bill of lading by signing it." This is the closest reference to the carrier's knowledge to be found in the court's opinion.

[19] See, for example, the following: Earnest *v.* Express Co., 1 Woods (U. S.) 573;

little emphasis. In some cases it has been distinctly repudiated as an essential element[20] and, as already pointed out, it is quietly ignored in the Hart case.[21]

Such ignorance or knowledge on the part of the carrier of the true value of the goods should constitute, we believe, the decisive factor in determining the validity or invalidity of a stipulation as to agreed valuation, where loss occurs through negligence. While such a rule might seem to introduce an uncertain element into what should be precise and easily determined, the burden would be upon the shipper who has agreed to another value to prove that the carrier through the agent accepting the goods had knowledge of their true value. Under such circumstances the rule would not wear an impracticable aspect, and it is not a case where third parties may be misled to their damage by the terms of the bill of lading. The carrier's duty should be to ship only at the true value, where known, so far as his liability for negligence is involved, since attempted limitation of this liability to a fixed sum is not permissible. If the courts sustain contracts of this kind, entered into with full knowledge on both sides of true value, simply because they take the form of agreed valuation,[22] an important exception has developed to the general rule forbidding contracts by common carriers limiting liability for negligence, and it would

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Overland Mail & Express Co. *v.* Carroll, 7 Colo. 43; Southern Express Co. *v.* Everett, 37 Ga. 688, 46 Ga. 303; Georgia R. R. & Banking Co. *v.* Keener, 93 Ga. 808; Georgia Southern Ry. Co. *v.* Johnson, 121 Ga. 231; Adams Express Co. *v.* Carnahan, 63 N. E. 245 (Ind.); Orndorff & Co. *v.* Adams Express Co., 3 Bush (Ky.) 194; Baughman *v.* Louisville, etc., R. R. Co., 94 Ky. 150; Kember & George *v.* Southern Express Co., 22 La. Ann. 158; Alair *v.* Northern Pacific R. Co., 53 Minn. 160; Southern Express Co. *v.* Stevenson, 42 So. 670 (Miss.), it is doubtful whether there was negligence in this case; Harvey *v.* Terre Haute, etc., R. R. Co., 74 Mo. 538; U. S. Express Co. *v.* Backman, 28 Oh. St. 144; Railway Co. *v.* Simon, 15 Oh. Cir. Ct. Rep. 123; Levy *v.* Southern Express Co., 4 Rich (S. C.) 234.

In Beck *v.* Evans, 16 East 244, Lord Ellenborough refused to limit the recovery to the £5, according to the terms of the then customary notice, on the ground that the carrier knew the value of the goods; but this principle seems to have been lost sight of in later cases, even before the passage of the Acts of Parliament in reference to the limitation of liability. Levi *v.* Waterhouse, 1 Price 280; Marsh *v.* Horne, 5 B. & C. 322.

[20] Douglas Co. *v.* Minn. Transfer Ry. Co., 62 Minn. 288, where the decision is made to turn on the fairness of the valuation. In this case the real value was about four and one-half times the agreed value. Mr. Justice Canty, in concurring, says that the rule "should be watched closely, as in practice it is liable to lead to evasion and abuse on the part of the common carrier." Southern Express Co. *v.* Owens, 41 So. 752 (Ala); Southern Ry. Co. *v.* Jones, 132 Ala. 437. See also note 26.

[21] See *supra*, note 18.

[22] See *infra*, note 32.

be difficult to reconcile such decisions with what have been held to be patent efforts to limit liability where the stipulation takes the form of limiting damages recoverable to a specific sum without regard to value.[23]

Notwithstanding the scant favor which this suggested criterion has in terms been accorded in the decisions, a study of the reasons suggested by the courts will disclose a possible approach to such criterion under the guise of other considerations. Such contracts as to agreed valuation, it is said, must be "fairly made," "*bona fide*," "just and reasonable," and "based on a reasonable consideration." As to this last element, some courts have held that there must be a distinct consideration in the form of a lower freight rate for the stipulation as to valuation,[24] and in general it is agreed that the stipulation as to value must be sustained by consideration. If, however, it is the true value, it would seem but logical to regard the consideration of carriage as sustaining all the agreements of the shipper, provided the tariff schedule is based upon relative value, and the very requisite that there must be a special consideration suggests the inference that by the fixing of a lower value than the true one the carrier is being partially relieved from liability.

Obviously, as a mode of protecting the carrier against fanciful and exaggerated valuations, and of liquidating the damages in advance, an agreed valuation commends itself to every one. Since value is a matter of opinion, where such agreed value is reasonably close to the true value, courts might hold that the spirit of the rule forbidding limitation of liability for negligence is not violated by upholding such agreed valuation. By it greater certainty in business transactions is obtained, and litigation in many instances avoided, since frequently the main purpose of such litigation is to determine the extent of the carrier's liability rather than its existence. Accordingly some cases have made the validity of the valuation depend solely on its approximating with reasonable

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[23] See *supra*, note 3.

[24] Southern Express Co. *v.* Hill, 98 S. W. 371 (Ark.); Adams Express Co. *v.* Harris, 120 Ind. 73; McFadden *v.* Mo. Pac. Ry. Co., 92 Mo. 343; Kellerman *v.* Kan. City, etc., R. R. Co., 136 Mo. 177; Gardner *v.* Southern R. R., 127 N. C. 293; and shipper may show that an alleged reduced rate is really not such, McFadden *v.* Mo. Pac. Ry. Co., *supra*; Conover *v.* Pac. Express Co., 40 Mo. App. 31; Ward *v.* Mo. Pac. Ry. Co., 58 S. W. 28 (Mo.); but where the contract sets forth that the rate is a reduced one, the burden is on the shipper to show the contrary. Evansville, etc., R. Co. *v.* Kevekordes, 69 N. E. 1022 (Ind.).

accuracy the true value of the goods,[25] and that, too, though the carrier had no knowledge whatever of the real value.[26] The curious result is reached in these last-mentioned cases that the more a man misrepresents the value of his goods to a carrier, the more likely he is to recover their true value where that carrier is negligent. Of course, if the carrier knows the true value, then, on the principle for which we are contending, the holding is correct, but in the cases referred to knowledge on the part of the carrier is distinctly negatived.

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[25] Murphy *v.* Wells, Fargo & Co., 108 N. W. 1070 (Minn.). In this instance 550 cases of strawberries were shipped at an agreed valuation of $50. They were worth about $2000 and $330 was paid for freight. The court holds the stipulation not just or reasonable. It is obvious that the carrier *knew* that $50 was not a *bona fide* valuation. As already pointed out, the same court sustained a valuation in Douglas Co. *v.* Minn. Transfer Ry. Co., 62 Minn. 288, where the true value was about four and one-half times the agreed value. In Gardner *v.* Southern R. R., 127 N. C. 293, stone, agreed value $46.60, real value $218, was shipped and the agreed valuation is held not conclusive. Here the court relied also on the fact that no consideration for the agreement as to valuation was shown. In Nashville, etc., Ry. Co. *v.* Stone & Haslett, 79 S. W. 1031 (Tenn.), a case of hogs worth two or three times the agreed value, the agreement is held unreasonable and void. So also Schwarzchild *v.* Nat'l Steamship Co., 74 Fed. 257, where a valuation of £1 per animal is held unreasonable. South & North Ala. R. R. Co. *v.* Henlein, 52 Ala. 606, 56 Ala. 368. With Ga. Pac. Ry. Co. *v.* Hughart, 90 Ala. 36, compare Western Ry. Co. *v.* Harwell, 91 Ala. 340. And yet in the case of the shipment of horses the value has often varied widely from the agreed valuation. Thus in the Hart case itself, where the agreed value of the horses was $200 each, the shipper offered to prove that the real value of one of them was $15,000. Numerous cases involving the transportation of live stock show a similar variance. It is apparent that in the case of such transportation there is a peculiar opportunity for the extravagant and fanciful valuations of which the courts have seemed so fearful. See the dissenting opinion in South & North Ala. R. R. *v.* Henlein, *supra*, where this is admitted, though the judge is opposed to permitting the agreed valuation to be conclusive in the ordinary case.

[26] Southern Express Co. *v.* Owens, 41 So. 752 (Ala.), and Southern Ry. Co. *v.* Jones, 132 Ala. 437. In this latter case a suit to recover damages for the negligent loss of a horse valued at $100, alleged to be worth $1500, the court says at page 442: "The question is not what the parties knew or intended, but what is the effect of the stipulation; not whether the parties intended evil or knew their act was hurtful to the public, but whether to allow and uphold such contracts would be fraught with wrong and injury to the people of a character from which it is the province and duty of government to protect them. So it is immaterial, when a carrier has stipulated for a limitation of damages resulting from his negligence to a greatly disproportionately small valuation of the property carried, whether he knew or was informed of its real value or not. It is against the public good in respect of a matter of governmental concern that he should be allowed to make such stipulation under any circumstances; and to allow it to stand in any instance or upon any consideration would be to emasculate the principle of public policy obtaining in the premises, and to leave the public exposed to all the uncertainties incident to inquiries into what carriers intended, or knew, or had been informed as to the real value of the property transported by them."

It is not clear precisely what is intended by an agreed valuation just and reasonable in its terms, unless that the agreed value must be reasonably close to the true value. If this is its meaning, then its bearing has already been considered. On the other hand, there is possibly an unconscious regard at this point for the provision of the English statute law with reference to the limitation of liability and the decisions of the English courts thereunder upholding these agreed valuations even in cases of negligence.[27] In fact, the court in the Hart case distinctly refers to the rule of the statute of Great Britain as "the proper one to be applied in this country, in the absence of any statute." In view, however, of the cases holding that a limitation in form to a specified sum is invalid in cases of negligence, this seems a conclusion without a reason unless we incorporate the idea, heretofore referred to, that the value fixed is sufficiently near the true value to be so held by the court, upon the principle *de minimis*, etc., or unless we add the proviso that it is just and reasonable only where the carrier does not know the true value. It is quite possible, for reasons which will be referred to later, to regard it just and reasonable to sustain these agreed valuations even in case of negligence, where the carrier does not know the true value. But where such value is known to him, it is not clear, under the existing decisions as to limitations not in the form of agreed valuation, how such agreed valuation can be sustained as just and reasonable where the agreed value varies from the true value otherwise than to a negligible degree.

It is possible that a court might take the view that limitation, actual and intended, is, within limits, to be permitted as just and reasonable when voluntarily agreed to by the shipper in the face of opportunity to ship at full value. This is perhaps the explanation of the Massachusetts cases,[28] and there is much to be said in its favor, but it is a view logically impossible for a court which refuses to allow any stipulation in form purporting to limit liability for negligence to a specific sum.[29]

Courts have not defined with precision what is intended by a contract fairly made or entered into *bona fide*, but these phrases seem to involve at least two thoughts: first, that there must be a

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[27] 1 Wm. IV., c. 68; 17 & 18 Vict., c. 31, § 7; McCance *v.* L. & N. W. Ry. Co., 7 H. & N. 477, 3 H. & C. 343; Manchester, etc., Ry. Co. *v.* Brown, 8 App. Cas. 703; Great Western Railway Co. *v.* McCarthy, 12 App. Cas. 218.

[28] See *supra*, note 10.

[29] See *supra*, note 3.

reasonable opportunity for the shipper to ship his goods at their true value and at a reasonable rate,[30] and second, that the contract must not be an obvious attempt to evade the general principle as to limiting liability for negligence.[31] The former of these reasons needs no comment: it is self-explanatory. As to the latter, it approaches, we believe, very close to recognizing the carrier's knowledge of the true value as the test of good faith. In all the cases the shipper presumptively knows the value of his own property, and the term can hardly be intended to apply to him. Where the carrier with full knowledge that the property is worth greatly more than the agreed value enters into a contract for its transportation at such agreed value as the basis of liability in case of loss, such contract can hardly be called one entered into in good faith if he intends to rely on it in case of negligent loss. If this is not what the "good faith" means, it is not easy to discover its significance. True it is, the cases which have held that contracts fixing an agreed valuation were not to be sustained because they evidenced an effort to evade the law depend almost invariably upon an explanation of the language of the contract as showing no real valuation. We refer, however, in the note to some cases which support in a measure the view we are suggesting.[32]

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[30] Manchester, etc., Ry. Co. *v.* Brown, 8 App. Cas. 703.

[31] See *infra*, note 32.

[32] The cases considering whether a stipulation is in substance a partial limitation of liability or a *bona fide* agreed valuation are of special interest. Eells *v.* St. Louis, etc., Ry. Co., 52 Fed. 903; Schwarzchild *v.* Nat'l Steamship Co., 74 Fed. 257; Georgia Pacific Ry. Co. *v.* Hughart, 90 Ala. 36; Galt *v.* Adams Express Co, MacArthur & M. (D. C.) 124; Central of Georgia Ry. Co. *v.* Murphey & Hunt, 113 Ga. 514; Moulton *v.* St. Paul, etc., Ry. Co., 31 Minn. 85; Doan *v.* St. Louis, etc., Ry. Co., 38 Mo. App. 408. In Newburger *v.* Howard, 6 Phila. (Pa.) 174, decided by Judge Hare and upholding an agreed valuation in a case of negligence before the Pennsylvania rule was settled otherwise, it is said that the carrier may require information as to value, etc., but that "such conditions must, however, be imposed in good faith, and not as a means of effecting an object which the law would not permit to be attained directly."

In Central of Georgia Ry. Co. *v.* Hall, 124 Ga. 322, the court holds that in a clear case the question is for the court, in a doubtful case for the jury, whether a stipulation is an agreed valuation or an attempt to limit liability.

The stipulation has at times taken the form of an agreement that the valuation of the goods shall depend on their value at the time and place of shipment, Pierce *v.* Southern Pac. Co, 47 Pac. 874 (Cal.), though the value at the point of shipment was only about one-half that at the point of destination. South & North Ala. R. R. Co. *v.* Henlein, 52 Ala. 606, 56 Ala. 368; L. & N. R. R. Co. *v.* Oden, 80 Ala. 38. Such stipulation has been upheld. Since, however, transportation is generally for the purpose of securing a higher price than that available at the shipping end, this seems an obvious effort to limit liability. Ruppel *v.* Allegheny Valley Ry., 167 Pa. St. 166;

This view constitutes, we believe, the true basis for these decisions. Where the carrier is proved to have had knowledge of the real value of the goods shipped, then neither by virtue of estoppel nor by virtue of contractual obligation is there ground for sustaining an agreed valuation in case of negligence, so long as the general rule as to limiting the liability of a common carrier for negligence is recognized and the cases refusing validity to contracts in form limiting liability to a fixed amount remain unquestioned.

But where the carrier does not know the true value, and the shipper in order to secure reduced rates misrepresents such value, there are adequate grounds for sustaining such agreed valuation. In such case the carrier has not attempted to limit his liability.[33] He is ready to carry at the full risk, but such risk being unknown to him he asks the shipper to fix it. His compensation is properly adjusted accordingly. Since the carrier's liability resembles that of an insurer, it is evident that each charge presumptively contains an increment as compensation for the risk. If the shipper knows that his valuation will not avail the carrier in case of negligence, he will in all probability misrepresent it constantly, since in most cases loss occurring will be due to negligence. In all cases where the goods are safely carried he saves a certain percentage of the freight, and therefore deprives the carrier of his just compensation, not merely in the one case where loss occurs, but in the ninety-nine where it does not. Therefore the carrier, if he is to be held liable for the real value in case of loss, must increase all his charges. The result is that the shipper who ships at an honest valuation must pay for the loss sustained by the man who misrepresents value. This places a premium on such fraud and produces a detriment to the community in general — not merely to the carrier — and accordingly is opposed to the public interest. Furthermore, the shipper has withheld from the carrier the freight money he has saved in the ninety-nine cases, and in the one case where loss occurs seeks to recover full value for his lost freight without surrendering such sum. The injustice of this is forcibly pointed out by Baron Bramwell in a characteristic opinion in Manchester, Sheffield & Lincolnshire Ry. Co. *v.* Brown.[34]

Rhymer *v.* D. L. & W. R. R. Co., 27 Pa. Super. Ct. 345; Houston, etc., Ry. Co. *v.* Williams, 31 S. W. 556 (Tex.).

[33] See Hart *v.* Pennsylvania Railroad, 112 U. S. 330, 340.

[34] 8 App. Cas. 703.

In all cases of common carriers the broad principles must result from the multiplicity of instances in which the carrier serves the public and the individual shipper, and while to restrain it from wilfully and knowingly endeavoring to relieve itself from negligence — now regarded a vital principle — contracts with this purpose must be held void; on the other hand, where it is ready honestly to perform its duties, it and the public generally must be protected from the act of the shipper who seeks to secure a low rate of freight by misrepresenting value. In these cases, therefore, the shipper should be denied recovery beyond the value declared by him. It is in a sense a penalty on him to restrain him from such misrepresentations, which, were the other view taken, would result in detriment to the community. The principle bears a faint though suggestive resemblance to the avoidance of a deed in the hands of the person who has altered it in a material part.

Such a modification does not, as the cases point out, encourage negligence. The carrier knows that for negligence he will be liable up to a fixed valuation, and accordingly gives to the parcels the care demanded by their value. Since the measure of due care is dependent to some extent upon value, it is to be expected that the law should lend its countenance to a rule ensuring the carrier's knowledge of the true value of goods entrusted to him.

Once more it is to be noted that these principles which justify the sustaining of an agreed valuation apply in the cases where the carrier does not know the value, and lose their significance entirely where, in whatever way it may happen, the value is disclosed to him. There is, it is submitted, no basis upon which agreed valuation in such cases can be sustained, so long as the rule as to limiting liability for negligence to a fixed sum remains law.[35]

The Hart case and its fellows seem to be the fruit of a graft upon the old case of Gibbon *v.* Paynton.[36] But in that case there was a misrepresentation in substance as to *the contents* of the parcel sent. The carrier had given notice, held sufficient, to the effect that he would not be answerable for money unless delivered to him as such and paid for accordingly. When the money in question was delivered in an old mail bag, with no notice thereof, it was a clear representation that the bag did not contain money. There never was a true bailment of the money, and the liability of carrier could not properly attach. There is a vast difference between imposing upon a carrier without his knowledge the possession, if we may use

[35] See the cases cited in note 3.

[36] 4 Burr. 2298.

this term in a loose sense, of certain goods, and agreeing with him as to the value of an article the nature of which he well knows. There are a number of cases like Gibbon *v.* Paynton, where the carrier is deceived as to the class of goods entrusted to him,[37] and while there is no doubt as to their soundness, it is questionable whether they can correctly be referred to as the source of the rule as to agreed valuation. Properly this rule applies only where the carrier has really been misled, and then results from the necessity of protecting the carrier and the public from the effect of continued misrepresentations in cases where the resulting rule does not furnish a stimulus to negligence.

It is interesting to note that more than half of the decisions have been rendered in cases of the transportation of live stock, principally horses, and the difficulty of determining their exact value in any case, but particularly in a case where they are of special breed or are valuable as race horses, furnishes an argument of some weight, it is admitted, in appealing to a court to hold the shipper to the value he has declared.[38] To this, we believe, is largely due the fact that the decisions have not more clearly recognized the importance of the carrier's knowledge or ignorance of the true value of the bailment. But unless the requirements of the courts that the contract must be "*bona fide*" and "*fairly made*," shall ultimately be construed to be a recognition of such knowledge or ignorance as the decisive factor in the case, it is impossible to regard these decisions otherwise than as disclosing a modification of the general rule as to limiting liability for negligence.

Herein lies their real significance, and it is this that renders them of importance. Between the two apparent possibilities, the law will develop, we believe, into a recognition of the importance of the carrier's knowledge or ignorance of the real value of the goods carried, for the policy of the rule forbidding the limitation by common carriers of their liability for negligence is, under present conditions of transportation in this country, so generally accepted that its modification is not probable.

Henry Wolf Biklé.

UNIVERSITY OF PENNSYLVANIA.

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[37] See, for example, Southern Express Co. *v.* Everett, 37 Ga. 688, 46 Ga. 303; Chicago, etc., R. R. Co. *v.* Thompson, 19 Ill. 578.

[38] See the dissenting opinion in South & North Alabama Railroad *v.* Henlein, 52 Ala. 606.